Supreme Court, U.S.
FILED
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No._____

In The

Supreme Court of the United States

October Term, Year 2000

RANDY T. LANIER

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether an erroneous jury instruction that omits seven of eight elements of an offense from the jury's consideration is subject to harmless error analysis?

II. Whether a criminal forfeiture verdict rendered under a preponderance standard can serve as proof that a constitutional error that occurred during the main trial was harmless beyond a reasonable doubt?

III. Whether a prisoner is precluded from challenging his conviction and sentence in a motion under 28 U.S.C. § 2255 when the conviction was based upon violations that did not occur within the offense's statute of limitations and when there was no reasonable basis upon which to develop the statute of limitations claim until after the direct appeal?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Randy T. Lanier, respectfully prays that a writ of certiorari issue to review the Opinion and Order amending the Opinion of the United States Court of Appeals for the Seventh Circuit entered February 9, 2000, and June 12, 2000.

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OPINIONS BELOW

The District Court Judgment was affirmed by the United States Court of Appeals for the Seventh Circuit on February 9, 2000. *Randy T. Lanier v. United States of America,* No. 98-2689 (7th Cir. 2/9/99). App. at 1.

On June 12, 2000, the United States Court of Appeals for the Seventh Circuit entered orders amending its original opinion and denying Mr. Lanier's petition for rehearing and petition for rehearing *en banc*. App. at 20-33, 33-35.

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STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeals for the Seventh Circuit was entered February 9, 2000. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc*

was filed on March 24, 2000. Orders denying rehearing and amending its original opinion were entered by the Seventh Circuit on June 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V
United States Constitution, Amendment VI
Title 18, United States Code, Section 3282 (1996)
Title 21, United States Code, Section 848 (1986)
Title 21, United States Code, Section 853 (1986)
Title 28, United States Code, Section 2255 (1996)

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STATEMENT OF THE CASE

Facts Material to Consideration of Questions I and II

Randy Thomas Lanier has been incarcerated since 1987 for his involvement in a marijuana smuggling operation. The government's indictment alleged he was involved in the

smuggling business between 1980 (when he was 26 years old) and 1987. He was convicted under 21 U.S.C. 848(b) of being the principal administrator of the marijuana business and sentenced, as required by the statute, to serve the remainder of his life in prison.[1]

In order to convict Mr. Lanier under 21 U.S.C. 848(b), the jury had to first find that he was involved in a continuing criminal enterprise, as is defined in 21 U.S.C. 848(c). Section 848(c) states that a person is involved in a continuing criminal enterprise if he or she

> (1) violates one of the drug statutes, and
>
> (2) such violation is a part of a continuing series of violations that were
>
> > (A) undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, supervisory position, or any other position of management, and
> >
> > (B) from which such person obtains substantial income or resources.

Mr. Lanier requested that the district court instruct the jurors that they must agree unanimously upon the offenses

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[1]Mr. Lanier was also convicted of conspiracy to distribute marijuana and conspiracy to defraud the United States, for which he received a total sentence of 45 years to run concurrent with the life sentence for CCE.

making up the "series of violations." The request was denied, and the jurors instead were told that they need only agree that Mr. Lanier committed at least three federal narcotics offenses.

On direct appeal, the Seventh Circuit upheld the trial judge's instruction.

On February 20, 1996, Mr. Lanier moved the district court to vacate his sentences pursuant to 28 U.S.C. § 2255. As part of his petition, Mr. Lanier asked the district court to reconsider its refusal at trial to give a unanimity jury instruction.

On March 5, 1998, the district court ruled on Mr. Lanier's 2255 petition and held that the jury unanimity claim had already been made on direct appeal and could not be raised again absent a showing of changed circumstances.

The circumstances of Mr. Lanier's case changed on June 1, 1999, when this Court held in *Richardson v. United States*, 526 U.S. 813 (1999), that jurors must agree on which specific violations make up the "continuing series of violations." At the time *Richardson* was decided, Mr. Lanier's appeal of the district court's denial of his 2255 motion was still pending before the Seventh Circuit.

In light of *Richardson*, Mr. Lanier filed a supplemental brief asking the Seventh Circuit to reverse his conviction. Specifically, he asked the Seventh Circuit to decide if the district court's failure to give a unanimity

instruction is subject to harmless error analysis and, if so, if the error constituted harmless error.

On February 9, 2000, the Seventh Circuit decided Mr. Lanier's case holding that the district court's failure to give a unanimity instruction violated *Richardson* but was subject to harmless error analysis. The Seventh Circuit ruled that the error was harmless on the basis that the jury's verdict in the bifurcated forfeiture trial necessarily established unanimity on the series of violations.

The Seventh Circuit amended its decision on June 12, 2000, to include an additional basis for finding the jury instruction error was harmless. The Seventh Circuit reasoned that the jury necessarily agreed upon the violations making up the continuing series because counsel conceded in his opening statement and closing argument that Mr. Lanier had been involved in the marijuana business.

Mr. Lanier respectfully petitions this Court for a writ of certiorari to review the Seventh Circuit's decision and to recognize that a jury instruction that violates *Richardson v. United States* is not amenable to harmless error review and cannot be harmless based upon a criminal forfeiture verdict that was rendered under a preponderance standard in a bifurcated proceeding.

Facts Material to Consideration of Question III

At Randy Lanier's trial, the district court instructed the jury that in order to find Mr. Lanier had been involved in a continuing criminal enterprise, the jurors must find that he was involved in a "continuing series of violations." The district court defined a "series of violations" as three offenses and offered the following offenses as those that the jury could choose from to make up the series:

(1) conspiracy to distribute marijuana

(2) importation of marijuana

(3) distribution of marijuana

The district court then instructed the jurors that at least one of the three offenses making up the series of three offenses had to have occurred within the statute of limitations, which meant at least one offense had to have occurred after November 25, 1982.

On direct appeal to the Seventh Circuit, Mr. Lanier argued that the jury should not have been allowed to rely upon conspiracy as one of the crimes making up the continuing series necessary for a CCE conviction. The Seventh Circuit, citing its then recent decision in *United States v. Baker*, 905 F.2d 1100, 1104 (7th Cir. 1990), agreed that conspiracy should not have been included as one of the crimes making up the continuing series necessary for a CCE

conviction, but affirmed Mr. Lanier's conviction on the basis that its opinion in *Baker* also established that the jury only had to find the defendant participated in two (rather than three) offenses. See *United States v. Kramer*, 955 F.2d 479, 486 (7th Cir. 1992). The Seventh Circuit reasoned that even if the jury used conspiracy as one of the three predicate offenses, the jury would still have to have found two additional offenses in light of the district court's instruction that a series means three offenses. *Id.*

As part of his § 2255 motion filed February 20, 1996, Mr. Lanier asked the court to vacate his CCE sentence on the basis that his conviction rested on violations that occurred prior to the statute of limitations.[2] Mr. Lanier argued that in following the district court's instruction to find a series of three offenses -- one of which had to have occurred after November 25, 1982 -- the jury might have considered conspiracy to be the offense that occurred after November 25, 1982, and then found two additional offenses that occurred before November 25, 1982. He reasoned that once the conspiracy was removed from the picture (by virtue of the Seventh Circuit's decisions in *United States v. Baker* and *United States v. Kramer*), then his conviction would have

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[2]The indictment charged seven predicate acts that occurred prior to the statute of limitations and eleven predicate acts that occurred within the statute of limitations.

remained standing on the basis of two offenses that occurred prior to November 25, 1982, and not within the statute of limitations.

The district court refused to examine the issue saying the issue was nonconstitutional and should have been raised on direct appeal. The Seventh Circuit affirmed the district court's refusal to review the issue.

Mr. Lanier respectfully petitions this Court for a writ of certiorari to review the Seventh Circuit's holding that a conviction based upon violations that did not occur within the offense's statute of limitations is not subject to attack under 28 U.S.C. § 2255 even when there was no reasonable basis upon which to develop the statute of limitations claim at the time of direct appeal.

REASONS FOR GRANTING THE WRIT

I. An erroneous jury instruction that omits seven of eight elements of an offense from the jury's consideration violates the Due Process Clause, renders a trial fundamentally unfair and is not amenable to harmless error analysis.

This writ should be granted in order to decide if harmless error analysis is applicable to an erroneous jury

instruction that omits seven of eight elements of an offense from the jury's consideration.

This Court has "often applied harmless-error analysis to cases involving improper instructions on a single element of the offense." *Neder v. United States*, 527 U.S. 1, 9 (1999)(citations omitted). In those cases, the errors were not considered structural in nature and "'did not seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Neder v. United States*, 527 U.S. 1, 9 (1999)(quoting *Johnson v. United States* 520 U.S. 461, 470 (1997); and *United States v. Olano*, 507 U.S. 7225, 736 (1993)).

In contrast, "structural" errors are "subject to automatic reversal." *Neder v. United States*, 527 U.S. 1, 8 (1999)(citations omitted). Structural errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Neder v. United States*, 527 U.S. 1, 9 (1999)(quoting *Rose v. Clark*, 478 U.S. 570, 577-578 (1986)).

The failure of a district court to give a unanimity instruction, as required by *Richardson v. United States*, 526 U.S. 813 (1999), must be recognized by this court as a structural error that violates the Due Process Clause of the Fifth Amendment. The error is structural because the error relieves the government of its burden of proving all the

elements of the offense charged and prevents the jury from considering and making a proper finding on not just one but numerous elements of the offense.

In Randy Lanier's case, the failure to give a unanimity instruction resulted in the omission of seven elements from the jury's consideration.[3] The first three elements that were omitted from the jury's consideration are the three drug violations the district court instructed the jury it must find in order to make up the series of violations. See *Richardson v. United States*, 526 U.S. 813, 818-819 (1999)(**Each violation making up the "series of violations" constitutes a separate element of the CCE offense**.) The three drug violations (each of which constituted a separate element) were effectively withdrawn from the jury's consideration because the jurors were erroneously instructed that they did not have to agree on the three violations needed to make up the series of violations.

The last four elements (set forth below) were withdrawn from the jury's consideration because the jury was not required to unanimously determine the series of violations before considering each of the four elements. The four elements are:

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[3]All seven of these elements are part of the CCE statute's definition (set out in 21 U.S.C. 848(c)) of what is required to find that a person was involved in a continuing criminal enterprise.

1. proof that the **series of violations** were "continuing" in nature -- that is, that the violations were related to each other in some way;

2. proof that the continuing **series of violations** were undertaken by Mr. Lanier in concert with five or more other persons;

3. proof that Mr. Lanier occupied a position of organizer, supervisory position, or other position of management over the five or more persons involved in the continuing **series of violations**; and

4. proof that Mr. Lanier obtained substantial income or resources from the continuing **series of violations**.

See 21 U.S.C. 848(c). Emphasis is placed on the phrase, "series of violations," in each of the elements set out above in order to emphasize that the jury's understanding of the phrase, "series of violations," was crucial to determining whether each of the four elements was present in Mr. Lanier's case.

While the district court gave instructions on these four latter elements, the instructions were preceded and tainted by the court's erroneous explanation of a "series of violations." The district court's faulty explanation removed each of these elements from the jury's consideration by allowing the jury to make four separate findings about the series of violations while under the mistaken impression that any three violations (regardless of whether the jurors agreed upon them) constituted a series of violations.

In summary, the government had to prove eight elements beyond a reasonable doubt to establish that Mr. Lanier was involved in a continuing criminal enterprise. The government was relieved of the majority of its burden when the district court failed to give a unanimity instruction and effectively changed Congress's intended definition of a "series of violations." The failure to give the unanimity instruction and properly define a "series of violations" tainted not just one but seven of the eight required elements. An erroneous jury instruction that effectively omits seven of eight elements of an offense from the jury's consideration "vitiates all the jury's findings," "produces consequences that are necessarily unquantifiable and indeterminate," and is not subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 11 (1999).

II. Using a preponderance of the evidence forfeiture verdict to find that a constitutional trial error was harmless violates a defendant's Fifth and Sixth Amendment right to a verdict of guilty beyond a reasonable doubt.

This writ should be granted in order to decide if a preponderance of the evidence verdict returned in a bifurcated forfeiture proceeding may serve as the basis for finding that a trial error was harmless beyond a reasonable doubt.

At least two Federal Courts of Appeals have said that evidence received during the forfeiture phase of a case cannot be used on appeal to sustain a conviction returned in the main trial. In *United States v. Sandini*, 816 F.2d 869 (3rd Cir. 1987), a case in which the defendant was convicted of CCE, the Third Circuit said:

> To promote fairness and simplicity in application, we invoke our supervisory powers to require that, in the future, in personam forfeiture proceedings, including evidence on that issue, be bifurcated from the guilt phase of criminal trials. We caution, however, that the verdict in the guilt phase must be based on adequate evidence and a standard of proof beyond a reasonable doubt. **Evidence received in the forfeiture phase, and therefore not before the jury when it determined guilt, may not be used in post-trial motion proceedings or on appeal to sustain the conviction itself.**

United States v. Sandini, 816 F.2d 869, 874 (3rd Cir. 1987)(emphasis added).

The Ninth Circuit, in *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988), ruled similarly in a RICO case:

> We therefore exercise our supervisory power to hold that trial courts should bifurcate forfeiture proceedings from ascertainment of

> guilt, requiring separate jury deliberations and allowing argument of counsel. The trial judge may exercise discretion in deciding whether to hold an evidentiary hearing. If the defendant can show, by affidavits or otherwise, that a hearing is required on the extent of his or her assets subject to forfeiture, the court should allow evidence on the issue. **Evidence received at this phase may not be used on appeal or at retrial to sustain the conviction, nor in post-trial motions.**

Id. at 662(emphasis added).

Sandini and *Feldman* have not been cited by any other cases for the above propositions, and counsel found no other cases that have addressed this issue. Thus far, the Seventh Circuit, in Mr. Lanier's case, is the only circuit to hold that evidence received in the forfeiture phase may be used on appeal to sustain a conviction.

The rulings in *Sandini* and *Feldman* are logical because reliance upon a forfeiture verdict to uphold a trial error as harmless violates the harmless error rule established in *Chapman v. California,* 386 U.S. 18 (1967). The rule, according to *Chapman*, is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict." *Chapman* at 24.

The key words in the *Chapman* rule are "beyond a reasonable doubt." They are key because the standard required for a forfeiture verdict is not the beyond a reasonable doubt standard but rather the preponderance of the evidence standard. See 21 U.S.C. 853(d). Use of the forfeiture verdict as a basis to rule that a constitutional violation at trial is harmless lowers the harmless error standard to a preponderance standard and violates both the harmless error rule and a defendant's Fifth and Sixth Amendment right to a jury verdict of guilty beyond a reasonable doubt.

In addition, reliance upon a forfeiture verdict to find a *Richardson* error harmless overlooks and cannot reconcile the significant fact that the verdict obtained in the forfeiture phase was tainted by the *Richardson* error committed in the trial phase. The taint in Mr. Lanier's case occurred when the jury was allowed to deliberate the issue of forfeiture without first rendering a sound CCE verdict.

More specifically, the criminal forfeiture statute, 21 U.S.C. § 853(a), provides that **any person convicted of CCE** shall forfeit to the United States any money or property derived from the CCE. Therefore, before the jury can deliberate on the issue of forfeiture, the jury must first render a sound conviction on the CCE charge.

In Mr. Lanier's case, the conviction on the CCE charge was unsound because of the erroneous *Richardson* jury instruction. Because the conviction on the CCE charge

was unsound, the forfeiture verdict was also unsound. And by relying upon the forfeiture verdict (which was tainted by the *Richardson* error) as the basis for finding the *Richardson* error harmless, the Seventh Circuit in essence relied upon the *Richardson* error itself to find the *Richardson* error harmless.

III. A sentence for illegal acts that did not occur within an offense's statute of limitations is subject to attack under 28 U.S.C. § 2255 because it is both a sentence imposed in violation of the Due Process Clause and a sentence imposed in violation of the laws of the United States.

This writ should be granted to decide if a prisoner is precluded from challenging his conviction and sentence under 28 U.S.C. § 2255 if his conviction was based upon violations that did not occur within the offense's statute of limitations and if there was no reasonable basis upon which to develop the statute of limitations claim until after the direct appeal.

According to 28 U.S.C. § 2255, a prisoner may move the court to vacate, set aside or correct his sentence if:

> (1) the sentence was imposed in violation of the constitution,
>
> (2) the sentence was imposed in violation of the laws of the United States,

(3) the court was without jurisdiction to impose the sentence,

(4) the sentence was imposed in excess of the maximum authorized by law, or

(5) the sentence is "otherwise subject to collateral attack."

See 28 U.S.C. §2255; *Davis v. United States*, 417 U.S. 333 (1974); *Andrews v. United States* 373 U.S. 334, 338 (1963). A conviction and sentence based upon predicate acts not within the offense's statute of limitations is a sentence imposed in violation of both the constitution and the laws of the United States.

A conviction and sentence for acts not within an offense's statute of limitations violate the constitution by denying an individual his or her Due Process rights. The Due Process Clause "was intended to prevent government from abusing its power or employing it as an instrument of oppression." *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 126 (1992). This court has also described due process as "protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), and "that which comports with the deepest notions of what is fair and right and just." *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950). When a person is convicted and sentenced for acts that did not occur within an offense's statute of limitations, he or she is judged and punished

arbitrarily, unfairly, and in a manner for which the Due Process Clause was intended to provide protection.

A conviction and sentence for offenses not within the statute of limitations is also a sentence imposed "in violation of the laws of the United States." Specifically, 18 U.S.C. § 3282 provides that:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3282. Conviction and punishment in violation of 18 U.S.C. § 3282 "inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255." *Davis v. United States*, 417 U.S. 333, 346-347 (1974). See also *Yates v. United States*, 354 U.S. 298, 312 (1957)(Verdict based upon a statutory time bar must be set aside); and *United States v. Fuchs*, ___ F.3d ___, No. 98-10173 (9th Cir. 7/6/00)(Same).

Mr. Lanier's failure to raise this statute of limitations issue on direct appeal should not have served to bar him from raising the issue in his motion to vacate his sentences pursuant to 28 U.S.C. § 2255. Mr. Lanier had no reason to raise this claim on direct appeal because the possibility that the jury may have convicted him based upon predicate

offenses outside the statute of limitations did not come about until following the Seventh Circuit's decisions in Mr. Lanier's case [4] and in *United States v. Baker*, 905 F.2d 1100 (7th Cir. 1990).[5]

In *Baker*, the Seventh Circuit held that a conspiracy may not be considered as one of the crimes making up the continuing series necessary for a CCE conviction. As a result of the decision in *Baker*, Mr. Lanier anticipated he would be granted a new trial since the jury in his case was erroneously instructed it could rely upon conspiracy as one of the three offenses making up the continuing series. The Seventh Circuit, however, ruled that although the district court erred in allowing the jury to consider conspiracy, Mr. Lanier's conviction could stand upon two predicate acts rather than three predicate acts. See *United States v. Kramer*, 955 F.2d 479, 486 (7th Cir. 1992).

What the Seventh Circuit did not consider was that the jury might have agreed upon conspiracy as the offense that occurred within the statute of limitations. When the conspiracy was removed from the picture (by virtue of *Baker*),

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[4] *United States v. Kramer*, 955 F.2d 479, 486 (7th Cir. 1992).

[5] The *Baker* opinion was issued on June 26, 1990. Mr. Lanier's brief on direct appeal was filed in July 1989. A decision in Mr. Lanier's case was rendered on January 30, 1992.

and when the Seventh Circuit upheld Mr. Lanier's conviction based upon the two other offenses the jury would have to have found, the possibility emerged that Mr. Lanier stood convicted of CCE based upon two offenses that occurred prior to November 25, 1982 and that were not within the statute of limitations.

Because counsel for Mr. Lanier could not have known that the *Baker* opinion would change the law in the Seventh Circuit or that the decision in his own appeal would allow his conviction to remain intact based upon two rather than three predicate offenses, the Seventh Circuit's decision affirming the district court's refusal to review his claim should be vacated. See *Reed v. Ross*, 468 U.S. 1, 17 (1984)(Habeas petitioner has cause for not raising an issue if there was no reasonable basis upon which to develop the legal theory).

CONCLUSION

For the above reasons, Mr. Lanier respectfully prays that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

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October Term, Year 2000

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RANDY T. LANIER

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UNITED STATES OF AMERICA,

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Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

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APPENDIX

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In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 98-2689

Randy T. Lanier,

Petitioner-Appellant,

v.

United States of America,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
Nos. 96 CV 4033 and 87 CR 40070--
James L. Foreman, Judge.

Argued November 2, 1999--Decided February 9, 2000

Before Cudahy, Coffey and Kanne, Circuit Judges.

Kanne, Circuit Judge. We once reviewed the convictions of Randy Thomas Lanier on direct appeal in *United States v. Kramer*, 955 F.2d 479 (7th Cir. 1992), and he appears before us again under 42 U.S.C. sec. 2255. Seven years ago, we affirmed his convictions for conspiracy to distribute marijuana and participation in a continuing criminal enterprise. Lanier now asks us to reconsider his convictions in light of two recent Supreme Court rulings: *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707 (1999), and *Rutledge v. United States*, 517 U.S. 292 (1996). We agree that his convictions violated the holdings of both cases but, unfortunately for Lanier, find that this changes little for him. We affirm the district court decision to vacate Lanier's conspiracy conviction but let the CCE conviction and its life sentence stand in light of Rutledge; we find that the trial court committed harmless error under Richardson. Lanier also raised a statute of limitations claim for which we affirm denial because he raised it on direct appeal and cannot present it again on collateral attack.

I. HISTORY

Randy Thomas Lanier enjoyed success in auto racing during the early 1980s and won rookie of the year honors at the Indianapolis 500 in 1986. The cash rewards of racing

provided him venture capital for the lucrative sideline occupation of directing a drug-dealing enterprise that imported several hundred tons of marijuana into the United States. We described his operation more fully on direct appeal in *Kramer*, 955 F.2d at 482-83. Lanier's drug enterprise collapsed when he and two confederates were arrested and charged with (1) conspiracy to distribute marijuana under 21 U.S.C. sec. 846 and 21 U.S.C. sec. 841 (a)(1); (2) participation as a principal administrator, organizer or leader of a continuing criminal enterprise ("CCE") under 21 U.S.C. sec. 848; and (3) conspiracy to commit federal tax fraud under 18 U.S.C. sec. 371.

Their trial began on January 26, 1988, and ran fourteen weeks before Judge James Foreman in the United States District Court for the Southern District of Illinois. Pursuant to Seventh Circuit precedent at the time, Judge Foreman did not instruct the jury that it must agree unanimously beyond a reasonable doubt which underlying violations constitute the "continuing series" for a CCE conviction. After five days of deliberation, during which the jury spent most of its time considering the CCE charges and deadlocked five times, the jury convicted all three defendants on all counts.

For the CCE conviction, Lanier was sentenced to the mandatory term of life imprisonment without possibility of parole. Lanier also received a forty-year term of

imprisonment for conspiracy and a five-year term for tax fraud added consecutively to the end of his forty-year sentence, with the forty-five-year cumulative sentence to run concurrently with his life sentence for CCE. Finally, the jury found Lanier liable for $60 million in criminal forfeitures relating to his CCE conviction.

During the forfeiture proceeding, the government requested a total forfeiture of almost $68 million for Lanier's participation in seven different drug shipments. The government claimed the following sums as Lanier's shares of the profits from the seven shipments: $2.2 million and $3 million for two shipments to Melbourne, Florida; $3 million for a Bridgeport, Connecticut, shipment; $12.8 million for a shipment to New York, New York; $15.5 million and $15 million for two Redwood City, California, shipments; $16.5 million for a New Orleans, Louisiana, shipment. The jury found Lanier liable for $60 million total in criminal forfeitures but returned its verdict without specifying the shipments in which Lanier had participated.

Lanier and two co-defendants appealed their CCE and conspiracy convictions, launching a flurry of assorted claims including two that are presented again in Lanier's sec. 2255 petition. We rejected all their claims in *Kramer* on January 30, 1992. 955 F.2d 479.

On February 20, 1996, Lanier filed this sec. 2255 petition. He offered two claims not argued on direct appeal:

(1) civil forfeiture of his property in an earlier proceeding constituted punishment for his crimes so his subsequent criminal convictions in a later proceeding violated the double jeopardy prohibition on successive punishment; (2) double jeopardy barred contemporaneous convictions for CCE and conspiracy to distribute. On April 23, 1997, before the district court ruled on Lanier's pending sec. 2255 petition, Lanier filed a supplement to his original petition, in which he added two arguments previously raised in his direct appeal: (1) the district court erred by failing to instruct the jury that it must agree unanimously which underlying crimes constitute the "continuing series" necessary for a CCE conviction; (2) the district court erred by permitting the jury to rely on the conspiracy charge as one of the violations within the continuing series even though some of the predicate acts for the conspiracy fell outside the statute of limitations for CCE offenses.

On March 5, 1998, the district court granted Lanier's petition by vacating the conspiracy conviction in light of Rutledge, subject to reinstatement if the CCE conviction is overturned, and applied Lanier's fifty dollar special assessment fee to Lanier's criminal forfeiture judgment. However, the district court let stand Lanier's CCE conviction and life sentence and denied Lanier's petition on all other grounds. Lanier now appeals the district court's decision to vacate his conspiracy conviction rather than his CCE

conviction and the denial of his petition with respect to his Richardson and statute of limitations claims.

II. ANALYSIS

We review *de novo* a district court's denial of a motion under sec. 2255 to vacate, alter or amend criminal sentences. *See Gray-Bey v. United States*, 156 F.3d 733, 737 (7th Cir. 1998), cert. denied, 119 S.Ct. 849 (1999). We review a district court's resentencing decisions under sec. 2255 for abuse of discretion. *See United States v. Smith*, 103 F.3d 531, 534 (7th Cir.1996) (entrusting to the district court's discretion the restructuring of the defendant's sentence when vacatur of a conviction is required under sec. 2255).

A. Absence of Richardson Jury Instructions

A jury found Lanier guilty of both conspiracy to distribute controlled substances in violation of 21 U.S.C. sec. 846 and conducting a continuing criminal enterprise in violation of 21 U.S.C. sec. 848. Section 848 defines CCE as "a continuing series of violations" of drug offenses undertaken in concert with five or more other persons with respect to whom the defendant occupies a position of organizer, supervisor or manager. See 21 U.S.C. sec. 848. Conviction for CCE requires a unanimous finding that the

defendant committed a "continuing series of violations," but Seventh Circuit precedent at the time of Lanier's trial and direct appeal did not mandate a jury instruction requiring jury unanimity regarding which specific violations form the continuing series. *See Kramer*, 955 F.2d at 486-87. We so held in *Kramer*, where we rejected Lanier's unanimity instruction argument on direct appeal and affirmed his conviction. Id.

In March 1999, the district court rejected this unanimity instruction claim in Lanier's sec. 2255 petition, reasoning that Lanier was barred from arguing this claim under sec. 2255 because he already raised and lost this issue in Kramer. However, the Court's decision in Richardson in June 1999 represents changed circumstances of law since Kramer, which permits Lanier to present his claim here under sec. 2255. We now reconsider whether the absence of a unanimity instruction, which Lanier presciently requested at trial, requires reversal of Lanier's CCE conviction.

Before the Supreme Court decided *Richardson*, the circuits split on the issue whether a CCE conviction requires jury unanimity regarding which violations constitute the continuing series. *Compare Richardson v. United States*, 130 F.3d 765, 779 (7th Cir. 1997) (holding that jury unanimity is not required), vacated by *Richardson*, 526 U.S. 813 (1999), *United States v. Hall*, 93 F.3d 126, 129 (4th Cir. 1996) (same), and *United States v. Anderson*, 39 F.3d 331, 350-

51 (D.C. Cir. 1994) (same), with *United States v. Edmonds*, 80 F.3d 810, 822 (3d Cir. 1996) (ruling that the jury must unanimously agree on which violations constitute the continuing series). In Richardson, the Supreme Court held that a jury must agree unanimously on which specific predicate acts constitute the "continuing series of violations" for a CCE conviction. 119 S.Ct. at 1710-13. The Court decided that each predicate violation within the series is itself an element of the CCE offense and that the jury must agree unanimously not only that the defendant committed a "continuing series of violations" but agree unanimously also about which violations the series comprised. See id. Thus, a defendant is entitled to an instruction that the jury must agree unanimously which specific acts support the CCE conviction. See id. Otherwise, a jury could convict a defendant even though some jurors found that the CCE conviction is based on one set of continuing violations while other jurors found that it is based on a different set of continuing violations.

We note quickly that *Teague v. Lane*, 489 U.S. 288, 305-09 (1989), does not apply. Lanier is entitled to the benefit of Richardson, even on collateral attack, because Teague only bars retroactive application of a "new rule" of criminal procedure. Id. Richardson simply articulated the meaning of "continuing series of violations" in sec. 848, and Teague is inapt here where we interpret a criminal statute. See *Bousley v. United States*, 523 U.S. 614, 620 (1998). Furthermore,

although Lanier presented his Richardson argument in a supplement to his original sec. 2255 motion, the supplemental filing did not constitute a "second or successive motion." Supplemental briefs submitted before the district court has decided the original motion are amendments to the original motion. *See Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999). Therefore Lanier's supplemental briefing was part of a single sec. 2255 motion properly before us now.

Lanier predictably insists that the district court failure to provide the unanimity instruction was a "structural" constitutional error within the meaning of *Arizona v. Fulminante*, 499 U.S. 279 (1991), which would require us to reverse Lanier's conviction without evaluating the prejudicial effect of the error. Such structural errors are so intrinsically harmful that they require automatic reversal of conviction. *See id.* at 310. The government disagrees and insists that the absence of a unanimity instruction is subject to harmless error analysis. Fortunately, the Supreme Court's decision last term in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827 (1999), is helpful here.

In *Neder*, 119 S.Ct. at 1836, the Court held that omission of an element from the district court charge to the jury is not a structural constitutional error exempt from harmless error analysis. The Court explained that structural errors "infect the entire trial process," id. at 1833 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993)), and

"necessarily render a trial fundamentally unfair." *Neder*, 119 S.Ct. at 1833 (quoting *Rose v. Clark*, 478 U.S. 570, 577 (1986)). The Court recognized that trial errors escape harmless error review only in a "very limited class of cases" and cited the example of "the complete deprivation of counsel or trial before a biased judge" because such a defect necessarily renders the trial fundamentally unfair and vitiates all the jury's findings of guilt. *Neder*, 119 S.Ct. at 1833. In contrast, omission of an element of a crime is not a structural defect, nor is an error involving improper instruction on a single element of an offense. See id. at 1833-34 *(citing California v. Roy*, 519 U.S. 2 (1996) (omission of an "intent or purpose" element of crime); *Yates v. Evatt*, 500 U.S. 391 (1991) (erroneous mandatory rebuttable presumption); *Carella v. California*, 491 U.S. 263 (1989) (erroneous mandatory conclusive presumption); *Pope v. Illinois*, 481 U.S. 497 (1987) (wrong standard for guilt)). An erroneous jury instruction on only one element of the crime draws harmless error analysis because the error does not pervade the entire judicial proceeding and render its outcome categorically unreliable or unjust.

The district court's failure to provide a unanimity instruction for Lanier on the underlying violations for his CCE conviction is likewise subject to harmless error analysis. *See United States v. Escobar-De Jesus*, 187 F.3d 148, 161-62 (1st Cir. 1999) (applying harmless error analysis to erroneous

jury instructions under *Richardson*); *United States v. Long*, 190 F.3d 471, 476 n.3 (6th Cir. 1999). This error is similar to the jury instructions in Neder where the court erroneously omitted an essential element of the crime but the harmless error standard applied. Lanier was deprived of a verdict with explicit jury findings listing the offenses on which the jury based its verdict of guilt on the CCE count, just as Neder was deprived of an explicit jury finding of guilt on an element of his offense. In both cases, the district court omitted an element of the offense from the jury instruction, and neither error pervaded the entire trial such that we necessarily must conclude that the verdict was unreliable or the error prejudiced the defense. Instead, we determine whether the absence of a Richardson instruction prejudiced Lanier's defense under the harmless error standard.

Lanier claims that the test for evaluating harmless error is whether it is apparent beyond a reasonable doubt that the error did not contribute to the verdict at all--an onerous standard for the government to meet. He cites *Sullivan v. Louisiana*, 508 U.S. 275, 278-79 (1993), and *United States v. Russell*, 134 F.3d 171, 181 (3d Cir. 1998), to support his claim, but this is not the proper test. In Neder, subsequent to Sullivan and Russell, the Court announced the standard for harmless error review: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder*, 119 S.Ct. at 1838. Lanier's

conviction therefore must be affirmed if Lanier would have been convicted for CCE even assuming that the jury had received the Richardson unanimity instruction at trial.

We must determine from the record whether the jury agreed unanimously on the identity of two specific criminal violations committed by Lanier. The jury found Lanier guilty of CCE and liable for $60 million in forfeitures in connection with his CCE violations, but returned its verdict without identifying the specific shipments in which Lanier had participated and upon which the CCE conviction and forfeitures were based. Even without a Richardson instruction, Lanier's CCE conviction signifies that each juror found Lanier guilty of at least two drug crimes because conviction for CCE requires a unanimous finding of guilt for at least two continuing violations. *Kramer*, 955 F.2d at 486. Nevertheless, we can decipher the forfeiture judgment to determine whether the jury agreed unanimously on two specific criminal violations. We find that the jury forfeiture verdict establishes unanimity regarding four continuing drug offenses at minimum.

At the criminal forfeiture proceeding, the government claimed almost $68 million as Lanier's share of the profits from seven separate drug shipments. Although Lanier's share of three shipments was less than $3 million for each, Lanier earned much more for each of the other four shipments: $12.8 million, $15.5 million, $16.5 million and $15 million. The

jury must have unanimously found Lanier guilty of criminal participation in each of these shipments because the forfeiture total would have fallen short of $60 million without all four sums.

Furthermore, the jury agreed unanimously on Lanier's specific crime with respect to each of those four shipments. The indictment listed three types of illegal conduct relating to the drug shipments, each of which could have served as an underlying violation to support Lanier's CCE conviction: (1) distribution of a controlled substance under 21 U.S.C. sec. 841(a)(1); (2) possession with intent to distribute under 21 U.S.C. sec. 841(a)(1); (3) importation of a controlled substance under 21 U.S.C. sec. 952(a). The government contends each juror must have found that Lanier had committed possession with intent to distribute because that crime is encompassed by both distribution and importation under these facts. We agree.

First, importation and possession with intent to distribute are coextensive here. Both crimes require possession of a controlled substance and knowledge, and the added requirement of intent to distribute under sec. 841(a)(1) is implicit in a guilty verdict for importation because no rational juror could conclude that Lanier imported at least 280 tons of marijuana for his own personal use without intent to distribute to others. *See, e.g., United States v. Stribling*, 94

F.3d 321, 325 (7th Cir. 1996); *see also United States v. Beltran-Garcia*, 179 F.3d 1200, 1206 (9th Cir. 1999). Lanier could not have committed the crime of importation without also committing the crime of possession with intent to distribute.

Second, the elements of distribution include the elements of possession with intent to distribute. Conviction for distribution under sec. 841(a)(1) requires the following elements: (1) knowledge that marijuana is a controlled substance; (2) possession; (3) intent to distribute; (4) transfer from one person to another. *See United States v. Johnson*, 127 F.3d 625, 628 (7th Cir. 1997). The first three elements suffice for conviction under sec. 841(a)(1) for possession with intent to distribute, *see United States v. Covarrubias*, 65 F.3d 1362, 1369 (7th Cir. 1995), so the jury could not have found Lanier guilty of distribution without also finding him guilty of possession with intent to distribute.

Despite the jury's opaque forfeiture verdict, we agree with the government that the jury must have unanimously found Lanier guilty of at least four violations of sec. 841(a)(1) for possession of a controlled substance with intent to distribute. Although the jury instructions in Lanier's trial were improper under Richardson, this was harmless error. We will affirm denial of Lanier's sec. 2255 petition with respect to his Richardson claim.

B. Vacatur of the Conspiracy Conviction Under Rutledge

The Supreme Court in *Rutledge*, 517 U.S. at 300, held that conviction for both conspiracy to distribute marijuana and CCE, based on the same drug distribution enterprise, violates the presumptive prohibition against double punishment for the same offense. *See also Ball v. United States*, 470 U.S. 856, 861-64 (1985) (requiring clear legislative intent for double punishment for a single offense); *Whalen v. United States*, 445 U.S. 684, 691-95 (1980). Recognizing that conviction for CCE requires proof of every fact necessary to convict for conspiracy to distribute, the Court concluded that "conspiracy as defined in sec. 846 does not define a different offense from the CCE offense defined in sec. 848." *Rutledge*, 517 U.S. at 300. Thus, the Court held that conspiracy to distribute marijuana is a lesser included offense within CCE and conviction for both crimes violates the presumption that Congress intended only one punishment for a single offense. See id. at 307. The Court reversed and remanded for further proceedings but did not specify which conviction should be vacated and which should stand. See id.

Lanier interprets this silence to mean that district courts should let stand the conviction that is "most justified by the totality of the circumstances" and vacate the other conviction. Citing jury notes from his trial, Lanier points out that the jury convicted him quickly on the conspiracy count

but deliberated for five days over the CCE count. Lanier claims that the jury would have convicted for conspiracy and acquitted him of CCE had the district court, pursuant to Rutledge, provided a lesser included crime instruction. Lanier also cites purported mitigating factors including the notion that marijuana is "not as harmful as many other controlled substances" and the fact that he was only in his youthful late-twenties at the time of his offenses. Although Lanier did not raise this lesser included offense argument on direct appeal, the Court's intervening decision in Rutledge since his direct appeal provides reasonable cause to excuse Lanier's failure and to hear this claim under sec. 2255. *See Reed v. Ross*, 468 U.S. 1, 17 (1984) (holding that failure to raise a claim on direct appeal is excusable when the claim is based on a new rule of constitutional law with retroactive effect decided after direct appeal).

The government wisely concedes that *Rutledge* applies here and agrees that the conspiracy conviction must be set aside. Nevertheless, Lanier argues that the district court improperly applied Rutledge by vacating the lesser conviction for conspiracy rather than the CCE conviction. However, when the presumption against double punishment requires invalidation of the conviction for either the greater or lesser offense, the choice of which conviction to vacate rests with the sound discretion of the district court. *See Ball*, 470 U.S.

at 864; *United States v. Martin*, 732 F.2d 591, 593 (7th Cir. 1984). We agree with the government that the district court did not abuse its discretion by vacating the lesser conviction of conspiracy and letting the CCE conviction stand. *See United States v. Boyd*, 131 F.3d 951, 954-55 (11th Cir. 1997) ("The proper remedy for convictions on both greater and lesser included offenses is to vacate the conviction and the sentence of the lesser included offense."); *see also United States v. McSwain*, 197 F.3d 472, 483 (10th Cir. 1999); *United States v. Brito*, 136 F.3d 397, 408 (5th Cir. 1998); *United States v. Rosario*, 111 F.3d 293, 301 (2d Cir. 1997). The infirmity of which Lanier complains is a technical one and does not diminish the finding of guilt for CCE. He was convicted of two crimes for the same predicate offense. It is not unjust nor an abuse of discretion to punish him for either crime here because the jury found him guilty of committing the offense that underlies both convictions. To argue that the conspiracy conviction was more justified or more certain than the CCE conviction is beside the point. Rutledge commands that Lanier receive only one punishment for his offense, but he was guilty of both crimes in fact.

Reviewing this sec. 2255 motion, the district court let stand the conviction for the more serious crime of CCE and vacated the lesser included conspiracy conviction as duplicative of the CCE conviction. It would be paradoxical for us to rule that his life sentence for the CCE count should

be vacated on account of his lesser conspiracy conviction when there would be no question at all had the government successfully convicted Lanier only on the CCE count and not charged or convicted him for the lesser offense as well. The district court did not abuse its discretion by vacating the conspiracy conviction and letting the CCE conviction stand.

C. Statute of Limitations

Lanier argues that the court improperly instructed the jury that it could rely upon the charged conspiracy under sec. 846 as one of the violations underlying the CCE count even though some of the predicate acts upon which the conspiracy charge was based were not within the statute of limitations period for the CCE count. However, Lanier failed to raise this nonconstitutional claim on direct appeal and now is barred from raising it for the first time in this sec. 2255 petition regardless of cause and prejudice. See *Barnickel v. United States*, 113 F.3d 704, 706 (7th Cir. 1997); *Olmstead v. United States*, 55 F.3d 316, 319 (7th Cir. 1995); *Bontkowski v. United States*, 850 F.2d 306, 313 (7th Cir. 1988). The district court dismissed Lanier's statute of limitations claim on this ground, and we will affirm.

III. Conclusion

For the foregoing reasons, we AFFIRM the grant of Lanier's sec. 2255 motion and vacatur of Lanier's conspiracy conviction, AFFIRM denial of Lanier's petition under his Richardson claim because we find harmless error and AFFIRM denial of Lanier's petition under his statute of limitations claim.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

App. 20

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 12, 2000

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

RANDY T. LANIER Petitioner-Appellant	] Appeal from the] United States District] Court for the Southern
No. 98-2689	] District of Illinois,
v.	]
	]
	] Nos. 96 CV 4033 and
UNITED STATES OF AMERICA	] 87 CR 40070
Respondent-Appellee	] James L. Foreman,
	] Judge

ORDER

The opinion issued in the above-entitled cause on February 9, 2000, is amended as follows:

On page 2, line 3, delete the sentence "Lanier also raised a statute of limitations claim for which we affirm denial because he raised it on direct appeal and cannot present it again on collateral attack."

On page 9, line 3, after the citation to *Kramer*, delete the rest of section II (A), beginning with the sentence "Nevertheless, we can decipher the forfeiture judgment to determine whether the jury agreed unanimously on two specific criminal violations." and ending on page 10, with the last sentence of section II(A) that reads "We will affirm denial of Lanier's § 2255 petition with respect to his *Richardson* claim." and replace with the following language:

> We can be sure that the jury agreed unanimously on at least two specific criminal violations because Lanier, in the face of overwhelming evidence about his involvement, did not even contest the government's allegation of his active participation in the drug-dealing enterprise that included at least seven drug shipments in addition to innumerable individual drug offenses. Indeed, Lanier's attorney conceded in his opining statement that there would not "be any effort to this jury to say that Randy Lanier is not involved, or that he did not do some

of the things you will hear about. We will not do that." His attorney explained in closing argument that "there is no dispute that Randy Lanier bought and sold marijuana, and he did it for a number of years. And in doing so, he undoubtedly engaged in a conspiracy with many of the people you saw in the witness stand to do so. There is no dispute about that. . . . We did not hid it from you. We did not try to deny it." Lanier's attorney conceded to the court at one point that the government has "got 600,000 pounds of marijuana for the love of Pete. They have got thirty some odd cooperating individuals all of whom are saying they are doing these bad things." Lanier instead argued at trial that his involvement was as a middle-man, not as a leader, and contested the government's allegations that Lanier served as a principal administrator of the operation.

The jury's forfeiture judgments under the lesser preponderance of the evidence standard reinforces our conclusion that the jury unanimously agreed on Lanier's participation in at least two continuing drug offenses. At the forfeiture proceeding, the government claimed almost $68 million as Lanier's share of the profits from seven separate drug shipments. Although Lanier's share of three shipments were less than $3 million for each, Lanier earned much more for each of the other four shipments: $12.8 million, $15.5 million, $16.5 million and $15 million. Without finding Lanier guilty of criminal

participation in each of these shipments, the forfeiture total would have fallen short of $60 million without all four sums.

The indictment listed three types of illegal conduct relating to the drug shipments, each of which could have served as an underlying violation to support Lanier's CCE conviction: (1) distribution of a controlled substance under 21 U.S.C. § 841(a)(1); (2) possession with intent to distribute under 21 U.S.C. § 841(a)(1); (3) importation of a controlled substance under 21 U.S.C. § 952(a). The government contends each juror must have found that Lanier had committed possession with intent to distribute because that crime is encompassed by both distribution and importation under these facts. We agree.

First, importation and possession with intent to distribute are coextensive here. Both crimes require possession of a controlled substance and k..owledge, and the added requirement of intent to distribute under § 841(a)(1) is implicit in a guilty verdict for importation because no rational juror could conclude that Lanier imported at least 280 tons of marijuana for his own personal use without intent to distribute to others. *See, e.g., United States v. Stribling*, 94 F.3d 321, 325 (7th Cir. 1996); *see also United States v. Beltran-Garcia*, 179 F.3d 1200, 1206 (9th Cir. 1999). Lanier could not have committed the crime of importation without also committing the crime of possession with intent to

distribute. Second, the elements of distribution include the elements of possession with intent to distribute. Conviction for distribution under § 841(a)(1) requires the following elements: (1) knowledge that marijuana is a controlled substance; (2) possession; (3) intent to distribute; (4) transfer from one person to another. *See United States v. Johnson*, 127 F.3d 625, 628 (7th Cir. 1997). The first three elements suffice for conviction under § 841(a)(1) for possession with intent to distribute, *see United States v. Covarrubias*, 65 F.3d 1362, 1369 (7th Cir. 1995), so the jury could not have found Lanier guilty of distribution without also finding him guilty of possession with intent to distribute.

In light of the overwhelming evidence against Lanier and the fact that he did not contest his involvement in the drug-dealing operation, combined with the jury's forfeiture judgments, we agree with the government that the jury would have unanimously found Lanier guilty of at least violations of § 841(a)(1) for possession of a controlled substance with intent to distribute. although the jury instruction in Lanier's trial were improper under *Richardson*, this was harmless error. We will affirm denial of Lanier's § 2255 petition with respect to his *Richardson* claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

RANDY THOMAS LANIER,	)	
	)	
Petitioner,	)	**CRIMINAL NO.**
	)	**87-CR-40070**
vs.	)	**CIVIL NO.**
	)	**96-4033-JLF**
	)	
UNITED STATES OF AMERICA	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

FOREMAN, District Judge:

This matter is before the court on Petitioner Randy Thomas Lanier's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence (Doc. 707). The Petitioner is represented by counsel in pursuing this motion. Pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings, the government has filed a written response to the motion (Doc. 710). The Petitioner has filed a reply (Doc. 713), a motion for an evidentiary hearing (Doc. 714), and a motion for leave to conduct discovery (Doc. 715). The government

has filed a supplemental response (Doc. 717). The Petitioner has also filed a motion to reserve ruling and adopt a proposed scheduling order (Doc. 723). The government has filed a response to the motion (Doc. 727), and the Petitioner has filed a reply (Doc. 753), a supplement to the reply (Doc. 756), and a second supplement to the reply (Doc. 759). The Petitioner has also filed a supplement to his original § 2255 motion (Doc. 754). For the reasons set forth below, the § 2255 motion is granted in part and denied in part.

BACKGROUND

The Petitioner was charged in a three count superseding indictment with (1) participating as a principal administrator, organizer, or leader of a continuing criminal enterprise in violation of 21 U.S.C. § 848 (Count 1); (2) conspiring to distribute marijuana in violation of 21 U.S.C. §§ 841 (a)(1) and 846 (Count 2); and (3) conspiring to defraud the United States under 18 U.S.C. § 371 by impeding the United States in its assessment and collection of revenue (Count 3). Following a jury trial, the Petitioner was found guilty as charged in the indictment, The Petitioner was sentenced to life imprisonment without possibility of parole on Count 1, forty years' imprisonment on Count 2, and five years' imprisonment on Count 3. His sentence on Count 3 was ordered to run consecutively to his sentence on Count 2. Counts 2 and 3 were ordered to run concurrently with Count 1. A special assessment of $50.00 per count was assessed for a total special assessment of $150.00. In addition, a forfeiture

judgment was entered against the Petitioner in the amount of $60,000,000. The Petitioner appealed his conviction and sentence, and on January 30, 1992, the Seventh Circuit affirmed. *United States v. Kramer*, 955 F.2d 479 (7th Cir. 1992).

On February 20, 1996, the Petitioner filed the instant § 2255 motion (Doc. 707). The court finds that no evidentiary hearing is required. Accordingly, pursuant to Rule 8(a) of the rules Governing Section 2255 Proceedings, the Petitioner's motion under § 2255 to vacate, set aside, or correct sentence is granted in part and denied in part.

DISCUSSION

The Petitioner raised two grounds for relief in his original § 2255 motion: (1) that his conviction and punishment were obtained in violation of the Double Jeopardy Clause; and (2) that his separate convictions and punishments for Counts 1 and 2 (continuing criminal enterprise and conspiracy to distribute marijuana) violated the Double Jeopardy Clause.

The Petitioner first argues that his conviction and punishment were obtained in violation of the Double Clause of the Fifth Amendment. He alleges that various *in rem* civil forfeiture proceedings, involving both real and personal property belong to him, were conducted and disposed of prior to his criminal conviction. Accordingly, he argues that his subsequent criminal conviction and punishment violated the Double Jeopardy Clause. In the recent decision of *United States v. Ursery*, 518 U.S. 267, ___, 116 S.Ct. 2135, 2149

(1996), the Supreme Court held that *in rem* civil forfeitures under 21 U.S.C. § 881 are neither "punishment" nor criminal for purposes of the Double Jeopardy Clause. Based on *Ursery*, the Petitioner's argument is without merit. His *in rem* civil forfeitures were neither "punishment" nor criminal for purposes of the Double Jeopardy Clause.

The Petitioner next argues that his separate convictions and punishments for Counts 1 and 2 violated the Double Jeopardy Clause because the continuing criminal enterprise charge alleged in Count 1 encompasses the same conduct as the conspiracy charge alleged in Count 2. In the recent decision of *Rutledge v. United States*, 517 U.S. 292, ___, 116 S.Ct. 1241, 1250 (1996), the Supreme Court held that : (1) conspiracy to distribute controlled substances under § 846 is a lesser included offense of continuing criminal enterprise under § 848; (2) a conviction for conspiracy to distribute controlled substances, in addition to a conviction for continuing criminal enterprise, amounts to a second punishment; and (3) one of the conviction must be vacated.

The government concedes that the Petitioner's conviction and sentence on the conspiracy charge alleged in Count 2 must be vacated in light of *Rutledge*. The government requests that the vacation of the conspiracy conviction be subject to the government's right to reinstatement in the event that for some reason the continuing criminal enterprise conviction is later overturned. In addition, the government requests that the $50.00 special assessment for the vacated

conspiracy conviction be applied to the Petitioner's $60,000,000.00 criminal forfeiture judgment instead of being returned to the Petitioner.

The Petitioner argues that, neither the United States Supreme Court nor the Seventh Circuit has ruled that the conspiracy, rather than the continuing criminal enterprise, conviction must be vacated when a defendant has been unlawfully convicted of both continuing criminal enterprise and conspiracy. He argues that, to the contrary, the courts have indicated that the decision is within the district court's discretion. *See Rutledge*, 517 U.S. at ___, 116 S.Ct. at 1250-51; *United States v. Rutledge*, 1996 U.S. App. LEXIS 11719, at *1 (7th Cir. May 2, 1996). He argues that this court should vacate the continuing criminal enterprise conviction, instead of the conspiracy conviction, for the following reasons: (1) because "the transcript of the events that transpired while the jury deliberated reveals that the conspiracy conviction represents the true consensus of the jury;" (2) because the conspiracy conviction was the first conviction returned by the jury; and (3) because the penalty for the conspiracy to distribute marijuana conviction and the conspiracy to defraud the United States conviction are adequate punishment .

This court is not persuaded by the Petitioner's arguments in this regard. Accordingly, his conviction and sentence on the conspiracy charge alleged in Count 2 are hereby vacated subject to the government's right to reinstatement in the event that for some reason the continuing criminal enterprise

conviction is later overturned. In addition, the $50.00 special assessment for the vacated conspiracy conviction is to be applied to the Petitioner's $60,000,000.00 criminal forfeiture judgment instead of being returned to the Petitioner.

In his supplement to his original § 2255 motion (Doc. 754), the Petitioner raised two additional grounds for relief. Those grounds are: (1) that this court's erroneous instruction that the jury could rely upon the charged conspiracy as one of the violations necessary to convict him of continuing criminal enterprise permitted the jury to convict him of continuing criminal enterprise based solely upon predicate acts not within the statute of limitations; and (2) that his Sixth Amendment right to a unanimous jury verdict was violated when this court failed to instruct the jury that the jurors must agree unanimously on the identity and relatedness of the substantive offenses and on the identity of each of the five people he was supposed to have managed.

The first of these two arguments, the statute of limitations argument, was not raised on direct appeal. Nonconstitutional claims which could have been raised on direct appeal, but were not, are barred and cannot be raised in a § 2255 motion regardless of cause and prejudice. *Barnickel v. United States*, 113 F.3d 704, 706 (7th Cir. 1997). Since the statute of limitations argument is a nonconstitutional claim that could have been raised on direct appeal, but was not, it is barred and cannot be raised in this § 2255 motion.

The second of these two arguments, the unanimous jury verdict argument, was raised on direct appeal. *See Kramer*, 955 F.2d at 486-87. An issue that was raised on direct appeal cannot be raised in a § 2255 motion absent a showing of changed circumstances. *Belford v. United States*, 975 F.2d 310, 313 (7th Cir. 1992), *overruled on other grounds by Castellanos v. United States*, 26 F.3d 717, 720 (7th Cir. 1994). The Petitioner has not alleged such changed circumstances in the present case. Accordingly, the unanimous jury verdict argument is barred and cannot be raised in this § 2255 motion.

CONCLUSION

Pursuant to Rule 8(a) of the Rules Governing Section 2255 Proceedings, the court finds that the Petitioner is entitled to relief under 28 U.S.C. § 2255 on Ground 2 of his motion. Accordingly, the Petitioner's § 2255 motion (Doc. 707) is granted as to Ground 2. The Petitioner's conviction and sentence on the conspiracy charge alleged in Count 2 are hereby vacated subject to the government's right to reinstatement in the event that for some reason the continuing criminal enterprise conviction is later overturned. In addition, the $50.00 special assessment for the vacated conspiracy conviction is to be applied to the Petitioner's $60,000,000.00 criminal forfeiture judgment instead of being returned to the Petitioner.

As to Grounds 1, 3, and 4 of his § 2255 motion, the Petitioner is not entitled to relief. Accordingly, the § 2255 motion (Doc. 707) is denied as to Grounds 1, 3, 4.

The following motions are also before the court: (1) the Petitioner's motion for an evidentiary hearing (Doc. 714); (2) the Petitioner's motion for leave to conduct discovery (Doc. 715); and (3) the Petitioner's motion to reserve ruling and adopt a proposed scheduling order (Doc. 723). These motions are hereby denied as moot.

IT IS SO ORDERED.

DATED; 2/27/98

/s/ James L. Foreman
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 12, 2000

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

RANDY T. LANIER Petitioner-Appellant	] Appeal from the] United States District] Court for the Southern
No. 98-2689	] District of Illinois,
v.	] Benton Division.
	]
	] Nos. 96 CV 4033 and
UNITED STATES OF AMERICA	] 87 CR 40070
Respondent-Appellee	] James L. Foreman,
	] Judge

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc*, no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

RANDY THOMAS LANIER,	)	
	)	
Petitioner,	)	
	)	**CRIMINAL NO.**
vs.	)	**87-CR-40070**
	)	**CIVIL NO.**
	)	**96-4033-JLF**
UNITED STATES OF AMERICA	)	
	)	
Respondent.	)	

JUDGMENT

This action came before the Court for a ruling on Petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The Court has rendered the following decision:

IT IS ORDERED AND ADJUDGED that the motion is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED AS TO GROUND 2** and **DENIED AS TO GROUNDS 1, 3, and 4**.

IT IS FURTHER ORDERED that the Petitioner's conviction and sentence on the conspiracy charge alleged in Count 2 are **HEREBY VACATED** subject to the

government's right to reinstatement in the event that for some reason the continuing criminal enterprise conviction is later overturned.

IT IS FURTHER ORDERED that the $50.00 special assessment for the vacated conspiracy conviction is to be applied to the Petitioner's $60,000,000.00 criminal forfeiture judgment instead of being returned to the Petitioner.

NORBERT G. JAWORSKI, CLERK

March 5, 1998 By: Doris Stull
Deputy Clerk

Approved: James L. Foreman EOD: 3-6-98

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

RANDY THOMAS LANIER,	)	
	)	
Petitioner,	)	
	)	**CRIMINAL NO.**
vs.	)	**87-CR-40070**
	)	**CIVIL NO.**
	)	**96-4033-JLF**
UNITED STATES OF AMERICA	)	
	)	
Respondent.	)	

ORDER

FOREMAN, District Judge:

This matter is before the court on petitioner Randy Thomas Lanier's motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (Doc. 781) and the memorandum in support thereof (Doc. 782). In his motion, Lanier requests that this court amend the March 5, 1998, judgment as follows: (1) Vacate the continuing criminal enterprise conviction rather than the conspiracy conviction; and (2) Remove the provision of the judgment which grants the government the right to reinstate the

conspiracy conviction in the event that the continuing criminal enterprise conviction is later overturned. That motion (Doc. 781) is **HEREBY DENIED.**

Also before the court is Lanier's motion to reserve ruling and adopt scheduling order (Doc. 723). That motion is now moot. Accordingly, the motion (Doc. 723) is **HEREBY DENIED.**

IT IS SO ORDERED.

DATED: 3-25-98

James L. Foreman

DISTRICT JUDGE

United States Constitution, Amendment V

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived or life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 18, United States Code, Section 3282 (1987)

§ 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Title 21, United States Code, Section 848(b) & (c) (1987)

§ 848. Continuing Criminal Enterprise

Conditions for life imprisonment for engaging in continuing criminal enterprise

(b) Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if--

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (d)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

Continuing criminal enterprise defined

(c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if--

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter--

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Title 21, United States Code, Section 853(a) & (d) (1987)

§ 853. Criminal forfeitures

Property subject to criminal forfeiture

(a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part,

a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Rebuttable presumption

(d) There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that --

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

Title 28, United States Code, Section 1254 (2000)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Title 28, United States Code, Section 2255 (1996)

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.